

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

77-6049

In The
United States Court of Appeals
For the Second Circuit

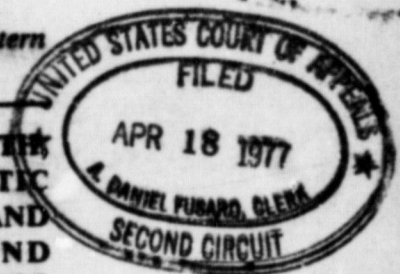
COUNTY OF SUFFOLK, et al.,
Plaintiffs-Appellees,

-against-

SECRETARY OF THE INTERIOR, et al.,
Defendants-Appellants.

*On Appeal from the United States District Court for the Eastern
District of New York.*

**AMICI CURIAE BRIEF OF FRIENDS OF THE EARTH
INC., THE SIERRA CLUB AND ITS ATLANTIC
CHAPTER, THE WILDERNESS SOCIETY, LONG ISLAND
SOUND TASK FORCE, INC., LONG ISLAND
ENVIRONMENTAL COUNCIL, INC. and GROUP FOR
AMERICA'S SOUTH FORK, INC.**



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TABLE OF CONTENTS

	PAGE
ISSUES PRESENTED	1
INTRODUCTION	1
INTERESTS OF AMICI CURIAE	4
ARGUMENT:	
POINT I - The District Court Acted within the Proper Scope of Its Powers under NEPA and Other Statutes in Reviewing the Action of the Secretary.....	6
A. The Procedural Objections	8
B. The Substantive Objections	14
POINT II - The District Court's Judgment Was the Most Appro- priate Relief	20
CONCLUSION	25

CASES CITED

Cases:

<u>Abbott Laboratories v. Gardner</u> , 387 U.S. 136	17
<u>Calvert Cliffs Coordinating Committee v. AEC</u> , 449 F.2d 1109 (D. Cir. 1971)	14, 15
<u>Camp v. Pitts</u> , 411 U.S. 138 (1973)	7
<u>Chelsea Neighborhood Association v. United States Postal Service</u> , 516 F.2d 378 (2d Cir. 1975)	11, 14, 15
<u>Citizens Committee for the Hudson Valley v. Volpe</u> , 425 F.2d 97 (2d Cir. 1970), <u>cert. denied</u> , 400 U.S. 949	3, 10, 17

<u>Citizens to Preserve Overton Park v. Volpe</u> , 401 U.S. 402 (1971)	passim
<u>Concerned About Trident v. Rumsfield</u> , 9 E.R.C. 1370 (D.C. Cir. 1976)	21, 23
<u>D.C. Federation of Civic Associations v. Volpe</u> , 459 F.2d 1231 (D.C. Cir. 1972)	10
<u>East 63rd Street Association v. Coleman</u> , ___ F.2d ___ (2d Cir. May 18, 1976)	21
<u>Environmental Defense Fund v. Corps of Engineers</u> , 470 F.2d 289 (8th Cir. 1972)	14, 17
<u>EDF v. Froehlke</u> , 348 F. Supp. 338 (W.D. Mo. 1972), <u>aff'd</u> , 477 F.2d 1033 (8th Cir. 1973)	21
<u>Friends of the Earth v. Carey</u> , 535 F.2d 185 (2d Cir. 1976)	4
<u>Hanley v. Mitchell</u> , 460 F.2d 141 (9th Cir. 1972)	14, 16, 20
<u>I-291 Why? Ass'n v. Burns</u> , 372 F. Supp. 223 (D. Conn. 1974), <u>aff'd per curiam</u> , 517 F.2d 1077 (2d Cir. 1974)	11
<u>Kleppe v. Sierra Club</u> , 427 U.S., Part 2, p. 390 (1976)	4, 16
<u>Monroe County Conservation Council v. Volpe</u> , 472 F.2d 693 (2d Cir. 1972)	14
<u>National Resources Defense Council, Inc. v. Callaway</u> , 524 F.2d 79 (2d Cir. 1975)	11
<u>Scenic Hudson Preservation Conference v. Federal Power Commission</u> , 453 F.2d 463 (2d Cir. 1971)	passim
<u>State of New York v. The Nuclear Regulatory Commission, et al.</u> , ___ F.2d ___ (2d Cir., Slip opinion, Docket Nos. 75-6115, 76-6022 and 76-6081, February 14, 1977)	18
<u>Wilderness Society v. Morton</u> , 479 F.2d 842 (D.C. Cir. 1972), <u>cert. denied</u> , 411 U.S. 917	20

Statutes:

Administrative Procedure Act, 5 U.S.C.A.	
§ 701 et seq.	8, 20
Federal Power Act, 16 U.S.C.A. ■ 803(a) ...	1
National Environmental Policy Act	
42 U.S.C. §§ 4321 et seq.	passim

Other Authorities:

Kurwin, <u>Substantive Review under the</u> <u>National Environmental Policy Act,</u> <u>at Ecology L.Q. 173 (1973)</u>	14
Hanks, <u>The National Environmental Policy</u> <u>Act After United States v. Scrap: The</u> <u>Timing Question and Substantive</u> <u>Review</u> , 4 Hofstra Law Review, 213 et seq.	14
Symposium: Environmental Decision- making, constituting the February, 1977 issue of Iowa Law Review, Vol. 621 No. 3	14

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AMICI CURIAE BRIEF OF FRIENDS OF THE EARTH, INC.,
THE SIERRA CLUB AND ITS ATLANTIC CHAPTER, THE
WILDERNESS SOCIETY, LONG ISLAND SOUND TASK FORCE,
INC., LONG ISLAND ENVIRONMENTAL COUNCIL, INC. and
GROUP FOR AMERICA'S SOUTH FORK, INC.

Issues Presented

1. Did the reviewing court act within the scope of its
procedural and substantive powers in reviewing the action of
the Secretary?

2. Did the District Court grant an appropriate relief?

Introduction

In Scenic Hudson Preservation Conference v. Federal
Power Commission, 354 F.2d 608 (1965), cert. denied, 384
U.S. 941 ("Scenic Hudson I"), this Court first stated some
basic principles of environmental decision-making, by way of

refinement of the comprehensive planning requirements of § 10(a) of the Federal Power Act, 16 U.S.C.A. § 803(a). In doing so it granted to "those who by their activities and conduct have exhibited a special interest in [the protection of environmental resources]," rights of participation in that decision-making (Id. at 616). It defined the respective roles of the administrative agency and the reviewing court.

Much of the history which followed Scenic Hudson I, the most important single aspect of which has been the codification in the National Environmental Policy Act, 42 U.S.C.A. § 4321 et seq. ("NEPA") of this Court's requirements that alternatives be studied and a full administrative record be developed, would seem to be irrelevant from a reading of the briefs of appellants and of amici Exxon Corporation et al. ("Exxon"). Seeking to overturn the application of clear rules of NEPA law and general administrative law, appellant National Ocean Industries Association, Inc. ("NOIA") calls for a reversal of Judge Weinstein's decision, on the ground that, "if not reversed, [it] would have a most severe impact upon the public interest." (NOIA Brief, p. 68) Federal appellants claim that the "national interest in obtaining new domestic sources of energy as soon as possible" is said to "decidedly outweigh" the "potential harm to the environment during the exploratory phase of the lease sale" (Federal appellants' Brief, p. 54).

Amici Friends of the Earth, Inc. ("Friends") et al. are some of the "responsible representatives of the public" who seek to protect "the public interest in environmental resources,"

codified in NEPA and other statutes, Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970), cert. denied, 400 U.S. 949 ("Citizens Committee"). The undersigned amici do not subscribe to the seemingly never ending repetition of the myth that some "ever increasing demand for energy" (Exxon Brief, p.4) precludes enforcement of the rule of law, that:

"...to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA]...." §§ 102.

Amici Friends, et al., on the contrary, submit that the very hearing of these appeals will come at a time when the nation will be in the midst of a basic reorientation of its energy policies. A major aspect of that reorientation will be an emphasis upon conservation and efficient use of energy and the husbanding of finite resources such as those the irrevocable appropriation of which might possibly be delayed by two to four months by enforcement of the District Court's decision, if such appropriation is finally declared lawful.

In this necessarily brief brief the undersigned amici will discuss some of the legal questions raised by appellants and Exxon, the most basic of which questions is that of whether lawful and orderly processes of governmental decision-making are as important in the environmental area of public policy as in other areas.

Interests of Amici Curiae

Amici deem it unnecessary to recite at length the nature, purposes or interests of the national organizations on whose behalf this brief is submitted. The role of the Sierra Club and its Atlantic Chapter ("Sierra") is essentially unchanged since this Court sustained its standing in Citizens Committee, supra, except that it has since then been a principal party to a larger number of the important cases that have declared the meaning of NEPA, including Kleppe v. Sierra Club, 422 U.S., Part 2, 390 (1976). Friends has been before this and other federal courts in a number of its important environmental cases, including Friends of the Earth v. Carey, 535 F.2d 165 (2d Cir. 1976). Both Sierra and Friends have large New York chapters. Sierra's is known as the Atlantic Chapter. Both are engaged in a wide variety of activities to protect the urban and coastal environments and to secure the efficient use of our nation's energy resources.

Amicus The Wilderness Society ("Wilderness") is a non-profit corporation organized and operating under the laws of the District of Columbia, whose objects and purposes include the conservation and protection of the wilderness areas and other natural resources of the United States. Several thousand of its members reside in the Long Island area or within a fifty mile radius thereof.

Amicus Long Island Environmental Council (the "Council") is a not-for-profit corporation with offices at 95 Middleneck Road, Port Washington, New York 11050. The Council is a coalition of individuals and over 100 Long Island organizations and corporations, including citizens groups, business corporations, commercial fish, shellfish and lobster firms and public interest groups, part or all of whose concern is environmental conservation. The Council serves as a coordinator of information and education on environmental issues of particular concern to Long Island and as a catalyst for action to preserve and promote a liveable environment for Long Island, in particular the Nassau and Suffolk County Area.

Long Island Sound Task Force, Inc. (the "Task Force") is a membership organization working to improve the environment of Long Island Sound and its adjacent waters. In addition to its environmental activities, it acts as a clearing house and resource center for all concerned with the health and future of the Sound. It is an independent non-profit tax exempt organization with its offices at 15 State Street, New York, New York.

Amicus Group for America's South Fork, Inc. (the "Group") is a New York corporation with its principal office in Bridgehampton, New York. The Group was formed for the purpose of preserving, protecting and conserving the natural environment throughout the south fork of the eastern end of Long Island. There are presently over 3,000 members and contributees, many of whom own property and/or reside along the south shore of Long Island.

ARGUMENT

POINT I

THE DISTRICT COURT ACTED WITHIN THE
PROPER SCOPE OF ITS POWERS UNDER
NEPA AND OTHER STATUTES IN RE-
VIEWING THE ACTION OF THE SECRETARY

Appellants and Exxon charge that Judge Weinstein did more than a reviewing court is authorized to do in finding and adjudging the "Sale 40 Final Environmental Statement" (the "EIS") inadequate and "a violation of both the letter and spirit of NEPA," requiring "rescission of the Secretary's leasing decision" (Decision 8, JA).* Appellants' and Exxon's complaints have two aspects--substantive and procedural.

NOIA states its substantive claim as follows, at page 52 of its brief:

"Judge Weinstein Indulged in Substantive Review of the Sale No. 40 Decision That Is Not Permitted by NEPA." (p. 52)

The federal appellants state that:

"Judge Weinstein, despite his disclaimer that he was not doing so,...engaged in impermissible substantive review of the Secretary's decision when he invalidated lease sale 40 on the grounds of a 'defective cost-benefit' analysis." (p. 43).

* The District Court's final memorandum and order dated February 17, 1977 is cited hereinafter as "Dec." "JA" refers to the Joint Appendix.

The procedural side of appellants' and Exxon's charges that Judge Weinstein acted outside of the proper scope of his functions has several aspects. NOIA complains (pp. 53-54) as follows:

"[T]he lower court had no warrant to look behind the EIS and to probe the Secretary's decision-making process."

The Federal appellants also "submit that NEPA does not contemplate judicial review of matters outside the EIS." (p. 47).

NOIA also claims that the District Court erred in receiving certain evidence (p. 54) and evaluating it (p. 55). They argue that in doing so Judge Weinstein violated the rule that "review of agency action must be limited to the administrative record, not some new record made in court." (p. 55; citing Camp v. Pitts, 411 U.S. 138 (1973)).

Exxon's objections are based upon disturbance and suspicion.* It is disturbed because the District Court appears to Exxon "to have reached out artificially for a basis on which to void the leases." (p. 7). Its "suspicion is heightened when it is remembered that Judge Weinstein raised sua sponte the principal ground on which he held the EIS defective." (p. 7).

The two categories of objections--substantive and procedural--are discussed below, in reverse order.

* Amicus American Gas Association also charges that the District Court "erred in allowing petitioners to raise issues not previously presented to the statutorily designated officers for determination." (p. 7).

A. The Procedural Objections

Appellants' and Exxon's procedural objections pose three questions:

1. In a case of review under the Administrative Procedure Act ("APA"), 5 U.S.C.A. §§ 701 et seq. of administrative action, may the reviewing court go outside of the "administrative record"?

2. In review of administrative action purportedly based upon an EIS, may evidence be received outside of the EIS itself, to determine its sufficiency and the validity of the action based upon it?

3. In a NEPA case, may a trial judge raise points of law or factual matters sua sponte?

The answer to the first question should be clear. There is no rule forbidding evidence outside of the administrative record in the trial of an action constituting a review of administrative action, under the APA. On the contrary, testimony outside of the "bare record" may "disclose the factors that were [or were not] considered" to enable the reviewing court "to determine if the [administrator] acted within the scope of his authority and if his action was justifiable under the applicable standard." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971)

Appellant NOIA's attorneys were, of course, aware of the problem of Overton Park. They have attempted to

distinguish it. In making their argument (pp. 53-4) that "the lower court had no warrant to look behind the EIS and to probe the Secretary's decision-making process," a rule which they say "merely reflects fundamental principles of administrative law that bar examination of internal documents...", NOIA states:

"Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420-21 (1971), is inapplicable here. In Overton Park, the Government was unable to offer any record of statutorily-mandated consideration of alternatives to the proposed federal action. For this reason, the Court permitted deposition testimony, production of internal documents and the like to reveal whether such alternatives had been considered. Here, in sharp contrast the EIS sets forth at length, on the public record, the discussion of the alternatives, environmental impacts, and all other matters concerning Sale No. 40 which NEPA requires be discussed." (p. 55 n34).

This is a misreading of Overton Park. There was a record of "statutorily-mandated consideration of alternatives to the proposed action", but the record was found by the Supreme Court, as Judge Weinstein found the record herein, to be insufficient. The record was insufficient because the courts below had incorrectly considered and weighed the factors to be considered and weighed in determining whether a road might lawfully go through parkland.

The Secretary of Transportation, whose action was reviewed in Overton Park, had contended that he "should weigh the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations and other factors..." (Id. 411). The Supreme Court held, in response,

that "no such wide-ranging endeavor was intended," (Id. 411), because the cost factors, safety considerations and other factors, on the one hand, and preservation of parkland, on the other hand, were not "on an equal footing". Part of its decision follows. (Id. 419-20)

"Thus it is necessary to remand this case to the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard."

Overton Park, at the time of the Supreme Court decision, was not a NEPA case. Nor was D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231 (D.C. Cir. 1972), which, like Overton Park, involved court review of action of the Secretary of Transportation with respect to a proposed federal highway. Not only was evidence beyond the administrative record received, but the Court of Appeals, in reversal of an earlier district court ruling, "remanded the case to the trial court for an evidentiary hearing ..." (Id. 1236).

In Citizens Committee, cited by Judge Weinstein in another context (Dec. 27, J.A.), in which this Court held that the review provisions of APA were jurisdiction conferring,

the trial of the principal issue in the district court's review of the administrative action of the Army Corps of Engineers was described by this Court, as follows:

"We turn now briefly to the merits of the controversy. After 29 days of trial, during which numerous exhibits were offered (including a model of the proposed Expressway), experts were examined, maps, charts and technical dictionaries were consulted and the facts were exhaustively presented, the district court concluded that construction of both a 'dike' and a 'causeway' were contemplated by the State." Id. at 106.

Appellants' objections to the District Court's going beyond the EIS itself for evidence as to the sufficiency of the EIS and the validity of the action purportedly based upon it are inconsistent with widespread practice in NEPA actions.

Chelsea Neighborhood Ass'n v. U.S. Postal Service, 389 F. Supp. 1171 (S.D.N.Y. 1975), aff'd, 516 F.2d 378 (2d Cir. 1975).

I-291 Why? Ass'n v. Burns, 372 F. Supp. 223 (D. Conn. 1974), aff'd per curiam, 517 F.2d 1077 (2d Cir. 1974).

NRDC v. Callaway, 389 F. Supp. 1263 (D. Conn. 1974), rev'd, 524 F.2d 79 (2d Cir. 1975).

In Chelsea affidavits specifically challenged the adequacy of the EIS estimates of the air and noise pollution. This Court held, not that such evidence was improper, but that in a revision of the EIS directed by this Court, an additional alternative to the project should be considered.

The objections to receipt of evidence "behind" the EIS, meaning, in less sinister sounding terms, evidence beyond the

EIS itself, are also inconsistent with the positions taken by appellants during the trial. They presented testimony in support of the EIS. They failed to object to much of the testimony to which they now object. They may not now say that evidence received without objection should not have been used as part of the basis for the District Court's decision.

NOIA attempts to solve this problem for itself by stating, not that certain evidence should not have been received, but that "Judge Weinstein erred in his treatment of the evidence in arriving at the conclusion that Interior's decision was arbitrary and capricious." (p. 53, underscoring supplied) Stated otherwise, NOIA argues that the evidence would have been treated properly by Judge Weinstein only if he found as they pleaded.

The third question raised by appellants and Exxon's procedural objections is the propriety of Judge Weinstein's acting sua sponte, to the extent that he himself raised issues of law or fact and examined witnesses. Without any citation of authority it is implied that such action is reversible error or somehow shades the findings and conclusions in the direction of reversible error.

Amici submit that Judge Weinstein's affirmative participation in the fact-finding and law-declaring process was not only proper but in accord with the letter and spirit of this Court's ruling in Scenic Hudson I. In describing the role of

the Federal Power Commission this Court stated:

"In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." 354 F.2d 608, 620 (2d Cir. 1965).

The District Court's duties herein as "representative of the public interest" were no less than those of the Federal Power Commission in Scenic Hudson I, in securing and ruling upon the evidence and creating a record for this Court to review.

One additional factor is also present in this action which was not present in Scenic Hudson I. The District Court was required by the nature of this action to expedite its determination. Such expedition imposed heavy burdens upon the Court and all of the counsel. If the fact is that some matters of fact or points of law were not raised by counsel, all of whom discharged their duties, including the necessary cooperative efforts with the Court and each other, in the best traditions of officers of the Court, that fact should not constitute any reason for attributing less force to points made by the District Court sua sponte than any that might have been made by it in an umpire-calling-balls-and-strikes role.

B. The Substantive Objections

Appellants and Exxon object to the District Court's engaging in a "substantive review of the administrative decision" (Dec. 57, JA) despite Judge Weinstein's disclaimer, under which he deemed it unnecessary to treat the "substantive rights" question under NEPA.*

The District Court has thus posed as a principal problem on this appeal this Court's again defining the proper scope of judicial review of environmental decision making, a subject in which obviously the Court itself will, and to a much greater extent any amici must, exercise self-restraint.**

To the extent that this Court has considered questions bearing upon any substantive rights question and its relationship to the question of what is arbitrary or capricious, such consideration has been primarily in Hanley*** and Chelsea. Neither case mentions substantive rights, either affirmatively or negatively. Both cases indicate an expansive approach to impact statement analysis. Thus Chelsea, quoting Monroe County v. Volpe, 472 F.2d 693 (2nd Cir. 1972), acknowledges that "the primary purpose of the impact statement is to compel Federal

* See: Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972); Calvert Cliffs, supra; Kurwin, Substantive Review under the National Environmental Policy Act, at 3 Ecology L.Q. 173 (1973); and Hanks, The National Environmental Policy Act After United States v. Scrap: The Timing Question and Substantive Review, 4 Hofstra Law Review, 213 et seq.

** One current treatment of the subject is in a "Symposium: Environmental Decisionmaking", constituting the February, 1977 issue of Iowa Law Review, Vol. 621 No. 3.

***Hanley v. Mitchell, 460 F.2d 640 (2d Cir. 1972).

agencies to give serious weight to environmental factors in making discretionary choices" (Id. 386), also citing Calvert Cliffs to justify a "balancing process". Chelsea thus makes clear that a careful weighing of environmental costs versus economic benefits is necessary.

In Chelsea the District Court enjoined the Postal Service from proceeding with construction on the ground that the EIS was inadequate since it failed to discuss sufficiently the detriments as well as the benefits of the proposed parking garage and housing unit. It is difficult to ascertain from the Chelsea decision whether the decision to build was inadequate in and of itself or whether the decision to build was "arbitrary and capricious" because it was based upon an inadequate EIS. In any event, the construction was enjoined under a standard of review that weighed the environmental and economic costs and benefits.

Amici Friends do not suggest that this Court rule on these appeals on the substantive rights question. Amici do submit that this Court should rule, following Calvert Cliffs, Hanley and Chelsea, that NEPA has some substantive meaning, that the duties it foists upon governmental agencies go beyond the preparation of impact statements, however adequate they may be.

Amici respectfully submit that the substantive meaning of NEPA is, at the very least, a direction to a court reviewing action governed by NEPA and requiring an EIS that it take a

"hard look" not only at the sufficiency of the EIS but at the balancing of the environmental and non-environmental factors in the making of its decision. No less would satisfy the directions of NEPA that,

"...to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act..." (NEPA, §102)

Moreover, in viewing the administration action the Court must, in and by its hard look, pass upon the weighing of the factors involved in the administrative decision as well as the inclusion in the administrative consideration of each "relevant factor". Overton Park; Scenic Hudson I.

It is unnecessary for this Court to do more, and perhaps this Court may even do less, in order to rule on the appeals before it, than determine whether the district court exercised its function properly in its assessing the administrative action of the Secretary in accordance with the principles stated above. This is because appellants argue that under Kleppe v. Sierra Club, supra, from which NOIA quotes a footnote (p. 52), and this Court's decision in Hanley, supra, the District Court was forbidden to take a hard look at the economics of the Secretary. The District Court might only, in the view of NOIA, take its "'hard look at [the] environmental consequences' of the sale" (p. 53, underscoring supplied).

There is a certain superficial validity to such an argument if one reads superficially the Kleppe v. Sierra Club

footnote and the quotation from Hanley. The analysis, however, must go further. It must begin with the hardly disputable proposition that NEPA did not subtract any of the APA review functions of the Courts in existence before its enactment. Such review in Kleppe, Hanley, and the cases at bar lies under Abbott Laboratories v. Gardner, 387 U.S. 136, as followed by this Court in Citizens Committee and other cases. Such review would permit a court to strike down the action reviewed if it were arbitrary or capricious or otherwise unlawful in any of its aspects, economic, environmental or other.

Hanley does not say otherwise. This Court's crediting plaintiffs therein with "'properly disclaim[ing] any attempt to argue before [this Court] the merits of the proposed building project'" (NOIA brief, p. 53), refers to the "merits" in the absence of action that might be held arbitrary or capricious.

To the extent that Judge Weinstein examined into the economics and the environmental impact in order to determine whether the action of the Secretary was arbitrary or capricious he was doing no more than that which has been done in the many NEPA cases in which courts have looked very hard at cost benefit formulae. E.g., EDF v. Corps of Engineers, supra.

The real question is whether Judge Weinstein looked too hard at the economics or the environmental aspects of the Secretary's action. Did he go beyond ascertaining whether the Secretary's action was arbitrary or capricious, and thereby go

into the "merits" of the action? The undersigned amici submit that this Court must hold that he did not, particularly if the role of this reviewing Court vis-a-vis the District Court, as well as that of the District Court vis-a-vis the Secretary, is a factor in this Court's ruling.

The role of this Court in reviewing action of the District Court is set out in R. 52(a), Federal Rules of Civil Procedure. Findings of fact of the District Court must be sustained unless "clearly erroneous". This Court is not required to "burrow into the documentary record in exactly the same way the district court [did]." New York v. NRC, __F.2d__, 9 ERC 1825 (2d Cir. 1977).

The findings of the District Court, to be upheld unless clearly erroneous, are summarized near the outset of the opinion constituting its findings and conclusion. Those findings relate to five material factors in his decision to proceed with the leasing. Judge Weinstein has found that the Secretary:

"1) ignored the practical effects of local governmental licensing, permitting and review powers in the NEPA documents; 2) failed to consider the environmental impact of specific probable pipeline routes from the outer continental shelf, in spite of the fact that projection of such routes is routinely made by industry and could have been made by the Secretary or his agents; 3) greatly overstated peak oil and gas production for Sale 40 and significantly understated the cost of such production, including pipeline construction; this resulted in a serious lack of consideration of the likelihood and attendant dangers of increased tanker traffic and an overestimate of the net value of the entire project;

4) failed to consider the possible impact of particular tract-selection choices on the feasibility and sites of pipelines; there was no consideration of the alternatives of either excluding industry-preferred tracts, or including less highly desired tracts in the final sale offer because of related onshore impacts and developments; and 5) failed to consider the alternative of separating exploration from production leasing." (Dec. 7-8, JA).

The District Court also found that:

"Each of the inadequacies, considered below in detail, constitutes a violation of both the letter and spirit of NEPA and requires rescission of the Secretary's leasing decision." (Dec. 8, JA).

Each of the factors which the District Court found to have been ignored by the Secretary is a "relevant factor", within the meaning of that term as used by this Court in Scenic Hudson I. No question is raised by appellants or Exxon with respect to the importance of each of the factors. Appellants argue, of course, that the District Court's findings are wrong. The undersigned amici submit that each such finding is clearly correct. Limitations of time and space, however, as well as consideration of the limited function of amici, render further discussion in this Brief of the details of the facts needless, and amici respectfully refer this Court to the briefs submitted by appellees.

Amici submit that neither the procedural nor the substantive objections to the findings and conclusions of the District Court are meritorious.

POINT II

THE DISTRICT COURT'S JUDGMENT WAS THE MOST APPROPRIATE RELIEF

From the very earliest NEPA cases it has been held that a material violation of its directives, in all but the most extraordinary cases, requires the enjoining of the major Federal action which is the subject of the unlawful decision-making. Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1972), cert. denied, 411 U.S. 917; Hanley v. Mitchell, 460 F.2d 640 (2d Cir. 1972). The rule is no different from that applicable to other administrative action which is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law (5 U.S.C.A. §706); it is not allowed to proceed until the illegality is cured. Scenic Hudson I, Citizens Committee.

Appellants and Exxon have a difficult burden of persuasion in arguing that this case is substantially different in any material respect from the usual case. Their principal reliance appears to be on rhetoric. NOIA says that it and "[t]he Government too will be severely damaged" (NOIA p. 68). The District Court order, it says, "would have a most severe impact upon the public interest". (NOIA p. 68). The relief granted by the District Court is "draconian". (p. 69). Exxon tells us we cannot bide our time. (Exxon p. 4) The "energy crisis is still growing", they allege. (p. 4)

The undersigned amici believe that they would not aid this Court by attempting to balance appellants' and Exxon's rhetoric with their own. They do submit that the only feature of the project involved in this action which may distinguish it from others is its size. If, however, the interests of those who are adversely affected by the District Court judgment are large, so, too, is the public interest which requires obedience to the laws held violated. The economic effects of any halting of the project are no more onerous than are the environmental effects of the proposed action upon the communities affected and their hundreds of thousands of residents and property owners.

The text of NOIA's brief is bereft of authority. In footnote 40, p. 69, three cases are cited, to wit:

Green County Planning Board v. FPC, 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972);

EDF v. Froehlke, 348 F. Supp. 338 (W.D. Mo. 1972), aff'd, 477 F.2d 1033 (8th Cir. 1973);

Concerned About Trident v. Rumsfeld, ___ F.2d ___, 9 ERC 1370 (D.C. Cir. 1976).

The Federal appellants cite Concerned About Trident, *supra*, and also State of New York v. NRC, ___ F.2d ___ (2d Cir., Feb. 14, 1977), and East 63rd Street Association v. Coleman, ___ F.2d ___ (2d Cir., May 18, 1976).

The later two cases are simply inapplicable. In East 63rd Street, the District Court dismissed, based not on the

inadequacy of an EIS, but on the equitable defense of laches, an irrelevancy in this proceeding. The State of New York case was decided on the question of the proper standard for issuing a preliminary injunction, an issue likewise inapposite to the current proceeding.

Of the case cited, the one which deserves any real discussion is Trident. In Trident, the District Court rejected all of the claims of plaintiffs with respect to the illegality of defendants' action, the construction of a "dedicated site" for a submarine base at Bangor, Washington.

On appeal to the D. C. Circuit, the District Court judgment was affirmed in part and reversed in part. The Court of Appeals, after rejecting defendants' contentions that there was a "national defense exemption from NEPA," held that, in several of the respects in which plaintiffs had challenged it, the EIS was sufficient, and that in two respects it was insufficient. The two respects in which the EIS was held insufficient were the project alternatives section of the final EIS and the discussion of the long-term effects of the project upon the area of the site.

The Court of Appeals affirmed the District Court holding that the Navy had "taken no arbitrary or capricious action [there] but [had] attempted to comply in good faith with the mandates of NEPA, failing in only two instances" The Court, accordingly, held:

"[W]e do not believe that the issuance of an injunction pending the Navy's revision of the Final EIS is necessary, especially since we have found that the Navy gave proper weight to environmental considerations in deciding to proceed with this strategically important project."
(Opinion at Point V)

In this action the District Court has found that the Secretary did not comply in good faith with the mandates of NEPA. It specifically found that the law was violated in letter and in spirit by a failure to consider several relevant factors, resulting in major deficiencies of the EIS. Moreover, this Court is not dealing with a project the construction of which was begun almost two years before the court ruling of the insufficiency of the EIS, as in Trident.

While it may be argued that energy is as important, strategically or otherwise, as a submarine base, the fact is that the energy, which may (or may not) come from the wells to be built pursuant to the leases which the District Court has rescinded, is several years off. That, of course, is no reason for delay, but if the delay is necessary for the proper and lawful decision to be made as to whether the project should proceed, such delay is mandated by law and is in the public interest.

With respect to such a delay, it is significant that while appellants and Exxon are generous with rhetoric about the energy crisis and the staggering costs of any delay, there is nothing before this Court which indicates that time

which may be necessary for the Secretary to remedy the deficiencies of the EIS, if he really proceeds in the expeditious manner, may be dictated by any growing energy crisis. Amici understand that the time should not be more than two to four months.

Amici submit that no reason exists for applying a rule different from the rule customarily applied in the great bulk of NEPA cases in which an EIS is found to be substantially deficient. Appellants' only real argument is "bigness." That is insufficient.

CONCLUSION

For the reasons stated above, the judgment of the District Court for the Eastern District of New York (Weinstein, J.) should be affirmed.

Respectfully submitted,

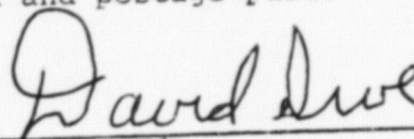
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April 14, 1977

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